Public Prosecutor v Mohd Amin bin Mohd Razali & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–34 OF 2000
ZULKEFLI J
16 OCTOBER 2000

Constitutional Law *— Emergency powers — Essential (Security Cases) Regulations — Validity of — Waging war against Yang di-Pertuan Agong — ESCAR provides for appeals from High Court to Supreme Court only, whether appeal side-stepping Court of Appeal legal — Powers and prerogative of Yang di-Pertuan Agong during emergency — Proclamation of emergency to validate ESCAR, whether valid — Essential (Security Cases) (Amendment) Regulations 1975 reg 26 & (1) — Emergency (Essential Powers) Act 1979 — Federal Constitution art 150(1) & (6)*

Criminal Procedure *— Trial — Essential (Security Cases) Regulations 1975 — Validity of — Waging war against Yang di-Pertuan Agong — ESCAR provides for appeals from High Court to Supreme Court only, whether appeal side-stepping Court of Appeal legal — Powers and prerogative of Yang di-Pertuan Agong during emergency — Proclamation of emergency to validate ESCAR, whether valid — Essential (Security Cases) (Amendment) Regulations 1975 reg 26 & (1) — Emergency (Essential Powers) Act 1979 — Federal Constitution art 150(1) & (6)*

All the 29 accused persons were charged for an offence of waging a war against the Yang di-Pertuan Agong ('YDPA') punishable under s 121 of the Penal Code. Counsel for the first accused raised a preliminary objection that the Essential (Security Cases) (Amendment) Regulations 1975 ('the ESCAR') pursuant to which the trial of the accused was being tried were invalid, null and void and of no consequence on the grounds: (i) reg 26 of ESCAR remains unamended up to now and appeals from the High Court can only go to the Supreme Court which does not exist; (ii) the 1969 Proclamation of Emergency under which the Emergency (Essential Powers) Act 1979 was made to validate ESCAR is null and void on the ground that the YDPA when proclaiming the emergency could not have acted on the advice of the Cabinet or a Minister under the general authority of the Cabinet because the Cabinet then had ceased to exist on the Dewan Rakyat standing dissolved; and (iii) the application of the Privy Council decision in the case of *Teh Cheng Poh v PP* [1980] AC 458.

Held, dismissing the appeal:

(1) The applicable law to clarify the position is the Constitution (Amendment) Act 1994 (Act A885) and not the amendment to the Courts of Judicature Act, namely Act A886 or Act A606 as contended by counsel for the accused. By virtue of s 46 of Act A885, all references in and under the Federal Constitution or any written law (which includes ESCAR) to the Supreme Court shall be construed as references to the Federal Court. Hence, there is

still the preservation of the right of appeal of the accused under ESCAR (see p 689B–D). A

(2) The right of appeal is dependent on the legal provision available in a specific statute. Thus if a statute does not provide for an appeal to the newly created Court of Appeal like ESCAR, then an appeal has to lie only to the Federal Court. A provision of law in the form of reg 26(1) of ESCAR providing for an appeal straight to the Federal Court thereby side-stepping the Court of Appeal is not illegal. The validity of reg 26(1) of ESCAR being made pursuant to the Emergency (Essential Powers) Act 1979 is reinforced by cl (6) of art 150 of the Constitution (see pp 689E, H, 690F, I–691A). B C

(3) Regulation 26(1) of ESCAR can exist independently of the other provisions of the regulations. Even if it is severed from the remaining regulations, it will not alter the scope and nature of ESCAR as a subsidiary legislation. Even if this court is to strike down reg 26 as null and void, it does not invalidate the whole of ESCAR since the right of appeal, avenue and procedure for appeal would still be guaranteed by other existing laws such as the Criminal Procedure Code and the Courts of Judicature Act 1964 (see p 691B–C). D

(4) It is imperative from the reading of cl (1) of art 150 of the Constitution that the YDPA may issue a proclamation of emergency if he is satisfied that a grave emergency exists. In this connection, a proclamation of emergency at that particular time in 1969 is within the royal prerogative of the YDPA in which case the YDPA can act personally without the advice of Cabinet or Minister acting under the general authority of the Cabinet (see p 691E, F–G). E F

(5) Even assuming the position that the YDPA has to act on the advice of a Cabinet of Minister in order for the YDPA to invoke his powers to issue a proclamation of emergency, the court still hold the view that if Parliament is dissolved and no new appointment is made while its dissolution is on, the Cabinet does not cease to exist and it can advise the YDPA in the exercise of his functions. The subsisting Cabinet will tend to be the care-taker government and can advise the YDPA on policy matters which include national emergencies, but it is up to the YDPA whether to act pursuant to the advice or not (see p 692C–D). G H

(6) The submission that the power exercisable by the YDPA must be exercised in accordance with the advice of the Cabinet is only true in a situation where the Parliament is sitting and the Cabinet in existence. In a situation where there is no cabinet to advise the YDPA, then he is expected to act on his own. Although cl (2)(a) of art 40 of the Constitution which expressly provides for the YDPA to act on his own discretion is absent in art 150(1), it will not attract the operation of cl (1) of art 40 of the Constitution I

since at that point of time there is no Cabinet in existence to advise the YDPA. Similarly, in a situation where the Dewan Rakyat is dissolved and the Cabinet ceased to exist, the YDPA is still empowered to issue a Proclamation of Emergency independently. To insist that cl (1) of art 40 to be strictly adhered to in such a situation would render cl (1) of art 150 nugatory (see pp 692H–693B).

(7) The case of *Teh Cheng Poh* prompted a legislative response by way of the Emergency (Essential Powers) Act 1979 (Acr 216) enacted under art 150(5) of the Constitution to supersede and validate the Emergency (Essential Powers) Ordinance 1969. Section 13(2) of Act 216 provides for the validation of regulations made under the Ordinance, whether before or after Parliament had sat, and these were deemed to have been made under the Act. Hence, ESCAR must be deemed to be valid (see pp 694G, 695A).

[Bahasa Malaysia summary

Semua 29 orang tertuduh telah dituduh atas satu kesalahan memerangi Yang di-Pertuan Agong ('YDPA') yang boleh dihukum di bawah s 121 Kanun Keseksaan. Peguam bagi pihak tertuduh yang pertama telah membangkitkan bantahan awal bahawa Peraturan-Peraturan Perlu (Kes-Kes Keselamatan) (Pindaan) 1975 ('ESCAR') di mana tertuduh telah dibicarakan adalah tidak sah, batal dan tiada kesan atas alasan: (i) peraturan 26 ESCAR kekal tidak terpinda sehingga ke hari ini dan rayuan-rayuan daripada Mahkamah Tinggi hanya boleh ke Mahkamah Agung yang tidak wujud; (ii) Pengisytiharan Darurat 1969 di bawah yang mana Akta Darurat (Kuasa-Kuasa Perlu) 1979 telah dibuat untuk mengesahkan ESCAR adalah batal dan tak sah atas alasan bahawa YDPA ketika mengisytiharkan darurat tersebut telah tidak bertindak atas nasihat Kabinet atau seorang Menteri di bawah kuasa am Kabinet kerana Kabinet ketika itu tidak wujud dengan Dewan Rakyat kekal terbubar; dan (iii) pemakaian keputusan Majlis Privi dalam kes *Teh Cheng Poh v PP* [1980] AC 458.

Diputuskan, menolak rayuan tersebut:

(1) Undang-undang yang boleh digunakan untuk memperjelaskan kedudukan tersebut adalah Akta Perlembagaan (Pindaan) 1994 (Akta A885) dan bukannya pindaan kepada Akta Mahkamah-Mahkamah Kehakiman, iaitu Akta A886 atau Akta A606 seperti mana yang ditegaskan oleh peguam bagi pihak tertuduh. Menurut s 46 Akta A885, semua rujukan di dalam dan di bawah Perlembagaan Persekutuan atau mana-mana undang-undang bertulis (yang mana termasuk ESCAR) kepada Mahkamah Agong akan ditafsirkan sebagai rujukan kepada Mahkamah

Persekutuan. Oleh itu, masih terdapat pengekalan hak rayuan tertuduh di bawah ESCAR (lihat ms 689B–D). A

(2) Hak merayu bergantung pada peruntukan undang-undang yang ada dalam statut yang khusus. Oleh itu, jika sesuatu statut tidak memperuntukkan sesuatu rayuan (seperti ESCAR) kepada Mahkamah Rayuan yang baru diwujudkan, maka sesuatu rayuan hanya boleh dibawa ke Mahkamah Persekutuan. Peruntukan undang-undang dalam bentuk peraturan 26(1) ESCAR yang memperuntukkan sesuatu rayuan terus kepada Mahkamah Persekutuan yang dengan itu mengetepikan Mahkamah Rayuan adalah sah. Keesahan peraturan 26(1) ESCAR yang diselaraskan dengan Akta Darurat (Kuasa-Kuasa Perlu) 1979 adalah diperkukuhkan oleh fasal (6) perkara 150 Perlembagaan (lihat ms 689E, H, 690F, I–691A). B C

(3) Peraturan 26(1) ESCAR boleh wujud secara bebas daripada peruntukan-peruntukan lain peraturan-peraturan tersebut. Meskipun ia diasingkan daripada peraturan-peraturan yang lain, ia tidak akan mengubah skop dan sifat ESCAR sebagai sebuah badan perundangan subsidiari. Meskipun jika mahkamah ini menolak peraturan 26 sebagai batal dan tak sah, ia tidak mengesahkan keseluruhan ESCAR oleh kerana hak merayu, cara dan prosedur rayuan masih tetap dijamin oleh undang-undang lain yang wujud seperti Kanun Acara Jenayah dan Akta Mahkamah Kehakiman 1964 (lihat ms 691B–C). D E

(4) Adalah penting daripada pembacaan fasal (1) perkara 150 Perlembagaan bahawa YDPA boleh mengeluarkan satu pengisytiharan darurat jika beliau berpuashati bahawa satu darurat sesungguhnya wujud. Sehubungan dengan ini, satu pengisytiharan darurat pada waktu yang khusus itu, dalam tahun 1969 adalah di dalam prerogatif YDPA dalam mana YDPA boleh bertindak secara peribadi tanpa nasihat Kabinet atau Menteri di bawah kuasa am Kabinet (lihat ms 691E, F–G). F

(5) Meskipun dengan menganggap bahawa YDPA terpaksa bertindak atas nasihat Kabinet Menteri bagi membolehkan YDPA menggunakan kuasa-kuasanya untuk mengeluarkan satu pengisytiharan darurat, mahkamah masih berpendapat bahawa jika Parlimen dibubarkan dan tiada perlantikan baru dibuat sementara pembubarannya berkuatkuasa, Kabinet tidak terhenti wujud dan ia boleh menasihatkan YDPA dalam melaksanakan fungsi-fungsinya. Kabinet yang berkekalan akan bertindak sebagai kerajaan penjaga dan boleh menasihatkan YDPA atas perkara-perkara dasar yang mana termasuk darurat negara, tetapi terpulang kepada YDPA sama ada untuk bertindak selaras dengan nasihat itu atau pun tidak (lihat ms 692C–D). G H

(6) Hujahan bahawa kuasa yang boleh dilaksanakan oleh YDPA mesti dilaksanakan menurut nasihat Kabinet adalah hanya benar di dalam sesuatu situasi di mana Parlimen sedang bersidang dan I

Kabinet wujud. Dalam situasi di mana tiada kabinet untuk menasihati YDPA, maka beliau dijangkakan bertindak dengan sendirinya. Walaupun fasal (2)(a) perkara 40 Perlembagaan yang secara nyata memperuntukan YDPA bertindak atas budi bicaranya tiada dalam perkara 150(1), ini tidak akan menarik operasi fasal (1) perkara 40 Perlembagaan kerana pada ketika itu tidak terdapat sebarang Kabinet yang wujud untuk menasihatkan YDPA. Begitu juga dalam situasi di mana Dewan Rakyat dibubarkan dan Kabinet tidak lagi wujud, YDPA masih mempunyai kuasa untuk mengeluarkan satu pengisytiharan darurat secara bebas. Bagi mendesak supaya fasal (1) perkara 40 dipatuhi dengan tegasnya dalam situasi yang sedemkian akan menjadikan fasal (1) perkara 150 sia-sia sahaja (lihat ms 692H–693B).

(7) Kes *Teh Cheng Poh* telah menyebabkan tindakbalas perundangan melalui Akta Darurat (Kuasa-Kuasa Perlu) 1979 (Akta 216) yang digubal di bawah perkara 150(5) Perlembagaan untuk mendahului dan mengesahkan Ordinan Darurat (Kuasa-Kuasa Perlu) 1969. Seksyen 13(2) Akta 216 memperuntukan pengesahan peraturan-peraturan yang dibuat di bawah Ordinan tersebut, sama ada sebelum atau selepas Parlimen telah bersidang, dan ini dianggap telah dibuat di bawah Akta tersebut. Oleh itu ESCAR mestilah dianggap sah (lihat ms 694G, 695A).]

Notes

For a case on Essential (Security Cases) Regulations, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1470.

For cases on trial under the Essential (Security Cases) Regulations 1975, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3360–3361.

Cases referred to

Ahmad Tajudin bin Haji Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)

Dato' Seri Anwar Ibrahim v PP [2000] 2 MLJ 486 (refd)

Don John Francis Douglas Liyanage & Ors v The Queen [1967] AC 259 (refd)

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341 (refd)

Kulasingam v PP [1978] 2 MLJ 243 (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (refd)

Madhavan Nair v Government of Malaysia [1975] 2 MLJ 286 (refd)

Moses Hinds & Ors v The Queen [1977] AC 195 (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower [1981] 2 MLJ 199 (refd)

Phang Chin Hock v PP [1980] 1 MLJ 70 (refd)

PP v Chu Beow Hin [1982] 1 MLJ 135 (refd)

PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273 (refd) A
Stephen Kalong Ningkan v Government of Malaysia [1968] 1 MLJ 119 (refd)
Teh Cheng Poh @ Chor Meh v PP, Malaysia [1980] AC 458 (refd)

Legislation referred to B

Constitution (Amendment) Act 1981 (Act A514)
Constitution (Amendment) Act 1994 (Act A885) s 46
Courts of Judicature (Amendment) (No 2) Act 1984 (Act A606) s 9
Courts of Judicature (Amendment) Act 1994 (Act A886)
Courts of Judicature (Amendment) Act 1995 (Act A909) s 17 C
Court of Judicature Act 1964
Criminal Law (Special Provisions) Act No 1 of 1962 [Ceylon]
Evidence Code [Ceylon]
Emergency (Essential Powers) Act 1979 (Act 216) ss 12, 13(1), (2)
Emergency (Essential Powers) Ordinance 1969
Essential (Security Cases) (Amendment) Regulations 1975 reg 26(1) D
Federal Constitution arts 40(1), 43(2), 44, 121, (2)(a), 128(3), 150(1), (5), (6), (8)
Penal Code s 121

Karpal Singh (*Jagdeep Singh Deo* and *Gobind Singh Deo* with him) (*Karpal Singh & Co*) for the first accused. E

Mohtar Abdullah (Attorney General) (*Gani Patail* and *Yusuf bin Zainal Abidin*) (Senior Deputy Public Prosecutors) (*Tun Abdul Majid bin Tun Hamzah, Sallehudin bin Saidin, Asmah bte Musa and Fatnin bte Yusuf*, Deputy Public Prosecutors with him) for the prosecution.

Zulkefli J: All the 29 accused persons stand charged as follows: F

> Bahawa kamu semua dari bulan Jun 2000 hingga 6 Julai 2000 di beberapa tempat di dalam Negeri Perak Darul Ridzuan iaitu:
>
> (a) Pos 2, Km 19, Kuala Rui, Jalanraya Timur Barat, Gerik, Hulu Perak;
>
> (b) Batalion 304, Infantri (AW), Kern Gerik, Gerik, Hulu Perak; dan
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor, Sauk, Mukim Cegar, Galah, Daerah Kuala Kangsar, G
>
> telah melancarkan peperangan terhadap Yang di-Pertuan Agong dan oleh itu telah melakukan satu kesalahan yang boleh dihukum di bawah s 121, Kanun Keseksaan.

In the midst of the examination in-chief of the twenty-ninth witness for the H
prosecution, Mr Karpal Singh, the learned counsel for the first accused, informed the court that he wished to raise a preliminary objection on points of law which may have an effect on the conduct of the trial. Mr Karpal Singh submitted that the Essential (Security Cases) (Amendment) Regulations 1975 ('ESCAR') pursuant to which the trial of all the 29 accused persons are being tried is invalid, null and void and of no consequence. Hence the I
trial should be forthwith halted in its tracks and it be held that although the charge under s 121 of the Penal Code may be good in law but the trial upon

that charge with 28 witnesses having given evidence and the twenty-ninth witness in the process of giving evidence in-chief is a nullity and in line with the decision by the Privy Council in *Teh Cheng Poh @ Chor Meh v PP, Malaysia* [1980] AC 458, the court should consider whether or not a new trial ought to be ordered. The Honourable Attorney-General for the prosecution, on the point raised by Mr Karpal Singh expressed his view that it was premature then for counsel to make such an application and more so when the twenty-ninth witness for the prosecution was in the midst of giving evidence. For convenience the Attorney-General impressed upon the court that the said twenty-ninth witness should be allowed to complete his evidence first. Henceforth, I allowed the oral application made by Mr Karpal Singh for him to raise a preliminary objection on points of law after the twenty-ninth witness for the prosecution completes his evidence. It is my view that the issues raised by Mr Karpal Singh are issues of law which should be disposed of as preliminary issues and which should be decided upon forthwith before the next witness is called to testify.

At the outset of his submission, Mr Karpal Singh submitted that the court should take note of the fact that ESCAR constitutes a draconian legislation which departs radically from the ordinary rules of evidence and procedure and the court should go the extra mile to ensure the trial is being conducted under rules which have the sanctity of law. The case of *Don John Francis Douglas Liyanage & Ors v The Queen* [1967] AC 259 was cited by counsel which involved a trial under the Criminal Law (Special Provisions) Act No 1 of 1962 of Ceylon in relation to trial of those involved in an abortive coup d'etat in Ceylon on 27 January 1962. The Act contained similar provisions like those in ESCAR.

The provisions in the Act contained substantial modifications of the Criminal Procedure Code. The Act also provided for the admission in evidence of certain confessions and statements to the police inadmissable under the Evidence Code of Ceylon. The 11 accused in this case were convicted of three offences in respect of an abortive coup d'etat on 27 January 1962. The offences were first, that they conspired to wage war against the Queen. Secondly, that they conspired to over-awe, by means of criminal force or the show of criminal force, the Government of Ceylon and thirdly, that they conspired to overthrow otherwise than by lawful means the Government of Ceylon by law established. 13 other accused who were tried with the appellants were acquitted. Each of the appellants was sentenced to ten years rigorous imprisonment and forfeiture of all his property. On appeal to the Privy Council, the appeals of the 11 appellants were allowed and their convictions and sentences quashed as it was agreed between the parties that if the Acts were ultra vires and invalid, the convictions could not stand.

In his submission proper, on the first main issue raised as a point of preliminary objection, Mr Karpal Singh submitted that ESCAR is invalid for the following reasons and in the context of the following background:

ESCAR was made pursuant to the Emergency (Essential Powers) Ordinance 1969 on 1 November 1975. ESCAR was declared

unconstitutional by the Privy Council in the case of *Teh Cheng Poh v PP* on 11 December 1978. By the Emergency (Essential Powers) Act 1979 (Act 216) enacted by Parliament, ESCAR was revived and resurrected with legislative force with effect from 26 January 1979.

The original reg 26(1) of the ESCAR states:

> The accused and the Public Prosecutor shall have the right of appeal as set out below:
>
> (a) if the decision is made by the High Court in the exercise of its original jurisdiction, he may appeal to the Federal Court;
>
> (b) if the decision is made by a subordinate court other than the court mentioned in sub-para (c), he may appeal to the High Court whose decision shall be final; and
>
> (c) if the decision is made by the Sessions, whose President is conferred with special jurisdiction under sub-s (3) of s 63 of the Subordinate Court Act 1948, he may appeal to the High Court with a further right of appeal to the *Federal Court*;
>
> and the decision of the *Federal Court* in respect of an appeal under sub-paras (a) and (c) shall be final; and for the purpose of this paragraph, the word 'decision' includes the whole or any part of any judgment, order or sentence made or passed by the relevant Court during the course or at the end of the trial or the hearing of an appeal, as the case may be, in that Court. (Emphasis added.)

was revived with the resurrection of the entire set of the regulations of the ESCAR.

Learned counsel Mr Karpal Singh submitted that appeal to the Federal Court was preserved under Act 216. In other words, any decision of the High Court in a security case triable under ESCAR was appealable up to the Federal Court. However, by the Courts of Judicature (Amendment) (No 2) Act 1984 (Act A606) which came into force on 1 January 1985 the Supreme Court was created with a two-tier system comprising appeals from the High Court to the Supreme Court. Section 9 of this Act reads:

> The principal Act [Courts of Judicature Act 1964] and all other written laws in force are amended by the substitution of the expression 'Supreme Court' for 'Federal Court' wherever the latter occurs.

This meant in reg 26 of ESCAR, Supreme Court was substituted for Federal Court.

Before January 1985 the Federal Court was the highest court in the country. Mr Karpal Singh further submitted that with the coming into force of the Courts of Judicature (Amendment) Act 1994 (Act A886) Federal Court was substituted for the Supreme Court in the Courts of Judicature Act 1964. However, *other written laws in force* remained unamended. There was no equivalent of s 9 of the Courts of Judicature Act (Amendment) (No 2) Act 1984 (Act A606) in the Courts of Judicature (Amendment) Act 1994 (Act A886).

The Courts of Judicature (Amendment) Act 1995 (Act A909), which came into force on 24 June 1994 brought in s 17 which reads:

> Any proceeding which is pending before the Supreme Court on the 23 June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 4th June 1994.

Mr Karpal Singh submitted that as can be clearly seen, this saving and transitional clause did not have an equivalent of s 9 of the Courts of Judicature (Amendment) (No 2) Act 1984 Act A606 to account for *any other written laws* in force at the coming into force of the Courts of Judicature (Amendment) Act 1994 (Act A886). It is the contention of Mr Karpal Singh that this meant that reg 26 of ESCAR remained unamended up to now and appeals from the High Court can only go to the Supreme Court *which does not exist*. It was submitted that reg 26 is invalid as recourse is given to a court which does not exist and in the present case where the punishment under s 121 of the Penal Code is death or imprisonment for life which extends to the duration of one's life, the court must act cautiously and with solemn circumspection. Learned counsel submitted that the question which has to be also addressed by the court with all the force at its command is:

> Does the invalidity of reg 26 invalidate the entire set of the Regulations?

It was emphatically submitted that it does and reg 26 is not severable from the rest of the regulations. The Privy Council case of *Moses Hinds & Ors v The Queen* [1977] AC 195 was cited to support the said proposition which, inter alia, at p 229 states as follows:

> The test of severability has been laid down authoritatively by the Board in *Attorney General for Alberta v Attorney General for Canada* [1947] AC 503 at p 518.
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

Mr Karpal Singh further submitted the right of the appeal accorded to the accused under reg 26 is a matter of substance and not a mere matter of practice and procedure, and such a right has accrued to all the accused from the commencement of the trial. This being the position it was submitted that reg 26 is inextricably bound up with the other regulations in ESCAR and cannot independently survive, and on a fair review of the whole matter it can be assumed the legislature would not have enacted what survives without enacting that which is ultra vires. It is also the submission of Mr Karpal Singh that as the Supreme Court does not exist anymore, the question of interpreting reg 26 does not arise. The right of appeal given to a non-existent court is a contradiction in terms; it is an impossibility. ESCAR has to be strictly construed as the life and liberty of all the accused are involved.

The second issue raised by Mr Karpal Singh as a point of preliminary objection which was required to be addressed relates to the 1969

Proclamation dated 15 May 1969 under which the Emergency (Essential Powers) Act 1979 was made to validate ESCAR which had been declared unconstitutional by the Privy Council in *Teh Cheng Poh v PP* on 11 December 1978.

It was submitted by counsel that the 1969 Proclamation of Emergency is null and void. The two cases of *Teh Cheng Poh v PP* and *Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286 were cited whereby it was contended that the King, when proclaiming an emergency, acts on cabinet advice or on the advice of a minister acting under the general authority of the cabinet and does not act personally. It was argued that art 40(1) of the Federal Constitution provides for the King to act on the advice of the cabinet or of a minister acting under the general authority of the cabinet. Mr Karpal Singh submitted that it was common knowledge that the Dewan Rakyat had been dissolved to enable elections to be held on 10 May 1969, and the fact that on 15 May 1969 there was no cabinet, the King could not have acted on the advice of the cabinet as the cabinet ceased to exist on the Dewan Rakyat standing dissolved. Likewise, it was contended there could have been no minister acting under the general authority of the cabinet as there was then no existing cabinet. In the circumstances, counsel submitted that clearly the provision of art 40(1) of the Federal Constitution could not have been invoked by the King. Mr Karpal Singh then posed the question: Who could have lawfully advised the King to proclaim an emergency on 15 May 1969? Learned counsel submitted that art 43(2) in relation to the cabinet provides for, inter alia, an appointment of a person while Parliament is dissolved. It was submitted that it is the Dewan Rakyat which was dissolved to enable the holding of elections on 10 May 1969, which resulted in the 13 May disturbances requiring a Proclamation of Emergency on 15 May 1969.

Mr Karpal Singh also submitted that because art 44 of the Federal Constitution states that Parliament shall consist of the King, the Dewan Rakyat and the Dewan Negara, therefore, the provisions of art 43(2) of the Constitution could not have been lawfully invoked as it is the Dewan Rakyat which had been dissolved, and not Parliament. It is also the contention of Mr Karpal Singh that even assuming Dewan Rakyat could be deemed to be Parliament, there was no gazette to show who was appointed after the Dewan Rakyat had been dissolved for the purposes of art 43(2). In any event it was submitted even if any personality or personalities had been appointed under art 43(2), only a care-taker Government could have been constituted. It was submitted that a care-taker Government could only carry on day to day administration in office and nothing more and a care-taker Government could not lawfully advise the King to declare an emergency. As such the Proclamation of Emergency by the King on 15 May 1969 was invalid.

Having heard the submissions made by learned counsel for the first accused, Mr Karpal Singh, and the Honourable Attorney-General for the prosecution, and having studied all the relevant provisions of the law and the case authorities cited by both parties, I hereby dismiss all the issues of

A the preliminary objection raised by Mr Karpal Singh. The following are my grounds or reasons in arriving at the said decision.

On the point raised that ESCAR pursuant to which the trial of all the accused persons are being conducted is invalid, null and void and of no consequence on the grounds that reg 26 of ESCAR originally speaks of a B right of appeal to the Federal Court and that it later provides the right of appeal to a court to wit, the Supreme Court which is no longer in existence, it is my view that the applicable law to clarify the position is the Constitution (Amendment) Act A885 and not the amendment to the Courts of Judicature Act, namely Act A886 or Act A606 as contended by counsel Mr Karpal Singh. By virtue of s 46 of the Constitution (Amendment) Act C 1994 (Act A885), all references in and under the Federal Constitution or any written law (which includes ESCAR) to the Supreme Court shall be construed as references to the Federal Court. Thus, pursuant to Act A885, reg 26 of ESCAR will read as, 'An accused shall have the right of appeal if the decision is made by the High Court in the exercise of its original jurisdiction, he may appeal to the Federal Court'. Hence, there is still the D preservation of the right of appeal of the accused under ESCAR. In this respect, I am in agreement with the honourable Attorney-General's submission that the simple argument to this approach is that the Constitution is the supreme law of the country and all other laws are subservient to it. It is also my view that the amendment is nothing more than a change of names of the court from 'Supreme' to 'Federal'. It does E not in any manner whatsoever alter or abolish the status of the Federal Court which is still the highest appellate court in the country.

As to the question of whether the accused persons in this case have a right of appeal to the newly created Court of Appeal under the Constitution (Amendment) Act 1994 [Act A885], I hold the view that the right of appeal F is dependent on the legal provision available in a specific statute. Generally the right of appeal is provided for under the Criminal Procedure Code or the Courts of Judicature Act. But these are statutes of general application, the operation of which can be excluded by specific statutes. On this point, I would like to refer to the case of *PP v Chu Beow Hin* [1982] 1 MLJ 135 wherein his Lordship Raja Azlan Shah LP (His Royal Highness as he then G was) at p 137, inter alia, had this to say:

> It is a special enactment, and in passing it the legislature had its intention directed to the special case which the statute was meant to meet, and considered and provided for all the circumstances of the special case where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law - *generalibus specialia* H *derogant.*

Thus, if a statute does not provide for an appeal to the newly created Court of Appeal (vide Act A885) like ESCAR, then an appeal has to lie only to the Federal Court. A support for this contention can be found in the decision of the Court of Appeal in the case of *Gana Muthusamy v LM Ong & Co* I [1998] 3 MLJ 341 wherein his Lordship Gopal Sri Ram JCA in dealing with the issue as to whether the court had jurisdiction in the first place to entertain the appeal in that case had this to say at p 345:

> Section 103E of the Legal Profession Act 1976 provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision of the High Court. In 1994 when this Court was established by the Federal Constitution the Courts of Judicature Act 1964 was amended in relation to appeals from the High Court. The amending legislation also provided that references in the Constitution to the Supreme Court were to be to the newly established Federal Court. The Legal Profession Act was not, however amended. Hence, it may be argued that appeals against the decision of the High Court under s 103E of the Legal Profession Act now lie, not to this Court, but directly to the Federal Court. We must therefore express our doubt as to whether this appeal has been properly brought before this Court as we may lack jurisdiction to entertain it altogether.

It is also my view that this stand taken is not unconstitutional as art 121(2)(a) of the Federal Constitution states that the Federal Court shall have jurisdiction to determine appeals from the decisions of the Court of Appeal, of the High Court or a judge thereof. This means that jurisdiction of the Court of Appeal to hear appeals from the High Court is not exclusive. Thus the Federal Court is also empowered to hear appeals from the High Court. Article 128(3) of the Federal Constitution provides that the jurisdiction of the Federal Court to hear appeals from, inter alia, a High Court shall be such as may be provided by Federal law. It is therefore not unconstitutional for a particular statute to prescribe for an appeal direct to the Federal Court. Furthermore, an appeal being a creature of statute, a provision may be made in a statute to prescribe the limits of the right of appeal given. A reference on this point may be made to the case of *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower* [1981] 2 MLJ 199 where his Lordship Abdoolcadeer J (as he then was) had this to say at p 202:

> An appeal is the creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (*Re Bowman* [1932] 2 KB 621).

I am of the view that a provision of law in the form of reg 26(1) of ESCAR providing for an appeal straight to the Federal Court thereby side-stepping the Court of Appeal is not illegal. This contention can be illustrated by the case of *Kulasingam v PP* [1978] 2 MLJ 243 wherein Suffian LP said at p 244:

> In our judgement the principle that we should apply here is the one that applies in respect of appeals by subjects *within* the United Kingdom, in regard to whom where there is no inherent right of appeal from a lower to a higher court, so that the subject may appeal if and only if statute so provides. Statute there provides for appeal to, among others, the Court of Appeal, and the subject could not appeal direct to the highest court, the House of Lords, without first going through the Court of Appeal — *until a recent Act of Parliament allowing an appellant to "leapfrog" the Court of Appeal in certain circumstances.* (Emphasis added.)

I further hold the view that the validity of reg 26(1) of ESCAR being made pursuant to the Emergency (Essential Powers) Act 1979 (Act 216) is

reinforced by cl (6) of art 150 of the Federal Constitution which provides as follows:

> ... no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force ... shall be invalid on the ground of inconsistency with any provision of this Constitution.

As regards the contention of counsel Mr Karpal Singh that reg 26 of ESCAR is not severable from the rest of the provisions of the Regulations, I am of the view that reg 26 of ESCAR can exist independently of the other provisions of the Regulations. It is not intrinsically intertwined with the other provisions of ESCAR. Regulation 26 falls within the part on APPEAL and even if it is severed from the remaining Regulations it will not alter the scope and nature of ESCAR as a subsidiary legislation. Even if this court is to strike down reg 26 as null and void, it does not invalidate the whole of ESCAR since the right of appeal, avenue and procedure for appeal would still be guaranteed by other existing laws such as the Criminal Procedure Code and the Courts of Judicature Act 1964.

As regards the contention of Mr Karpal Singh that the 1969 Proclamation of Emergency dated 15 May 1969 under which the Emergency (Essential Powers) Act 1979 (Act 216) was made to validate ESCAR is null and void on the ground that the Yang di-Pertuan Agong (YDPA) when proclaiming the emergency could not have acted on the advice of the cabinet or a minister under the general authority of the cabinet because the cabinet then had ceased to exist on the Dewan Rakyat standing dissolved, I am of the view it is imperative from the reading of cl (1) of art 150 of the Federal Constitution that the YDPA may issue a proclamation of emergency if he is satisfied that a grave emergency exists. Article 150(1) of the Federal Constitution states as follows:

> If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

In this respect I hold the view that a Proclamation of Emergency at that particular time in 1969 is within the royal prerogative of the YDPA in which case the YDPA can act personally without the advice of cabinet or minister acting under the general authority of the cabinet. The above view is fortified in the case of *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119 wherein his Lordship Barakbah LP, in delivering the majority decision of the Federal Court at p 122, had this to say:

> ... In my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists, it is not for the court to inquire as to whether or not he should have been satisfied.

Hence cl (1) of art 40 of the Federal Constitution is inapplicable in those circumstances. In interpreting the application of cl (1) of art 150 of the Federal Constitution I take the view that in a country with a written constitution like ours, the Constitution is supreme and the courts must give meaning to the cold letter of the Constitution, interpreting the provisions of

the document from the words alone, without importing extraneous rules of law, practice or convention. On this point I would like to refer to the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 wherein his Lordship Raja Azlan Shah FCJ (His Royal Highness as he then was) at pp 188–189 had this to say:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544. Each country frames its constitution according to its genius and for the good of its own society. We look to other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Even assuming the position that the YDPA has to act on the advice of a cabinet of ministers in order for the YDPA to invoke his powers to issue a Proclamation of Emergency, I still hold the view that if Parliament is dissolved and no new appointment is made while its dissolution is on, the Cabinet does not cease to exist and it can advise the YDPA in the exercise of his functions. The subsisting Cabinet will tend to be the care-taker Government and to my mind a care-taker Government can advise the YDPA on policy matters which include national emergencies, but it is up to the YDPA whether to act pursuant to the advice or not. To support the above contention I only need to refer to the case of *Madan v Charan* Cal 95 (paras 2, 15) to quote from pp 412–413 of Basu's *Commentary on the Constitution of India* (6th Ed) Vol E (arts 32–75) 1981; wherein it is stated as follows:

> The question, on the merits, as to what should be the status of this Council of Ministers during the period of dissolution or until an alternative Ministry commanding the confidence of the House can be formed.
>
> The learned judge of the Calcutta High Court opined that when a Council of Ministers, after its resignation, is asked by the President to continue in office, 'until other arrangements are made', it holds office only as 'care-taker Government' so that it can advise the President only on matters of day to day administration which is necessary for carrying on 'for making alternative arrangements' and that if such a Ministry advised the President to act on a policy matter, the President would not be obliged to act according to that advice. The learned judge has conceded that there is no mention of any 'care-taker Government' in the Constitution of India, but relies on an observation in Jennings on Cabinet Government.

It is also my view that if the court were to agree with the case of *Teh Cheng Poh*, wherein, the Privy Council advised that the power exercisable by the YDPA, must be exercised in accordance with the advice of the cabinet, it is submitted that it is only true in a situation where the Parliament is sitting and the cabinet in existence. In a situation where there is no cabinet to advise the YDPA, then he is expected to act on his own. This is so by drawing an analogy with cl 2(a) of art 40 of the Federal Constitution, wherein the YDPA can act on his own in the appointment of a Prime

Minister. Although this cl 2(a) of art 40 expressly provides for the YDPA to act on his own discretion, the absence of such a clause in art 150(1) of the Federal Constitution will not attract the operation of cl 1 of art 40 of the said Constitution, since at that point of time there is no cabinet in existence to advise the YDPA. Similarly in a situation where the Dewan Rakyat is dissolved and the cabinet ceased to exist the YDPA is still empowered to issue a Proclamation of Emergency independently. To my mind to insist that cl 1 of art 40 to be strictly adhered to in such a situation would render cl (1) of art 150 nugatory. In this respect in my view cl 1 of art 150 of the Federal Constitution has to be given a purposive interpretation because it is enacted to empower the YDPA to issue a Proclamation of Emergency irrespective of the existence of the cabinet, as long as the situation warrants for invocation of such a power. Support for the contention on this purposive interpretation can be found in the case of *PP v Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 wherein his lordship Suffian LP in delivering the judgment of the Federal Court at p 275 had this to say:

> Where the meaning of the words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral, or to paraphrase the words of Lord Scarman at p 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactment, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.

On the validity of the Proclamation of Emergency in 1969 it has to be emphasised here that the validity of the Proclamation PU(A) 145/69 has not been challenged since its promulgation. It has to be categorically noted and emphasised that Mr Karpal Singh himself had once conceded to the validity of the proclamation PU (A) 145/1969. This can be seen in the case of *Madhavan Nair v Government of Malaysia* [1975] 2 MLJ 286 wherein at p 287 his Lordship Chang Min Tat J (as he then was), inter alia, states as follows:

> Nothing turns on the Proclamation. It is not argued for the applicant that this Proclamation is invalid or has not been properly proclaimed or that it is not still in force. Neither is it contended that it has not been properly laid before both Houses of Parliament in accordance with art 150(3) or that any resolution has been passed annulling it or that it has been revoked. Mr Karpal Singh for the applicant concedes the validity of the Proclamation.

On the point of concession made by counsel on a certain point of law, I agree with Mr Karpal Singh that he is at liberty now to take a different view on the same matter. (See the case of *Ahmad Tajudin bin Haji Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241. It is well settled that counsel is not bound by an erroneous admission of law that he made. Neither is the court. If counsel makes an erroneous admission of law, he

may withdraw it at any time, even on appeal. Mr Karpal Singh now takes the stand that the Proclamation of Emergency by the YDPA in May 1969 was invalid on the ground that the YDPA did not act on the advice of the cabinet as required by art 40(1) of the Constitution. He also argued that both cl (8) to art 150 of the Constitution and s 12 of Act 216 are not retrospective in operation, thereby not affecting the Proclamation of Emergency dated 15 May 1969 in relation to its validity in point of judicial review thereof. It is to be noted on this point that the Honourable Attorney General had earlier submitted that the fact that the validity of the said Proclamation of Emergency had not been challenged since its promulgation is further reiterated by the Constitution (Amendment) Act 1981 (Act 514) which came into force on 15 May 1981, wherein a new cl (8) to art 150 was inserted. Clause (8) is an ouster clause and it totally precludes any form of challenge of the Proclamation of Emergency on any grounds whatsoever in a court of law. A provision of similar effect is found in s 12 of the Emergency (Essential Powers) Act 1979 (Act 216). The Honourable Attorney General hence, contended that given the terms of the said ouster clause provisions, it would appear that art 150(1) and (2) under which the proclamation is made would leave no scope at all for a jurisdictional challenge in point of law. It was further contended for the prosecution that the scope of application of cl (8) of art 150 has also gained judicial recognition by the Court of Appeal in the recent case of *Dato' Seri Anwar Ibrahim v PP* [2000] 2 MLJ 486. Hence its applicability cannot be questioned. On this point even assuming that the contention of Mr Karpal Singh is correct in that the Constitution (Amendment) Act 1981 (Act A514) which brought in the said ouster cl (8) of art 150 is not retrospective in operation and for the purposes of the Proclamation of Emergency dated 15 May 1969 the 1981 amendments to art 150 are irrelevant, I would still for reasons or grounds herein before already stated hold the view that with or without the advice of the cabinet, the YDPA had the royal prerogative and the personal discretion to validly invoke the said Proclamation of Emergency on 15 May 1969.

Last but not least, on the submission of the application of the Privy Council decision of the case of *Teh Cheng Poh*, I would only need to state that the said Privy Council decision prompted a legislative response by way of the Emergency (Essential Powers) Act 1979 (Act 216), enacted under art 150(5) of the Federal Constitution to supersede and validate the Emergency (Essential Powers) Ordinance 1969. Its long title reads:

> ... to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after 20 February 1971, and for the validation of all acts and things done under the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder, and to provide for matters connected therewith.

The Emergency (Essential Powers) Ordinance 1969, the parent legislation under which the disputed Essential (Security Cases) Regulations 1975 were made, itself was repealed (See s 13(1) of Act 216). But the Act reproduced the substantial rule-making powers of the Ordinance (see s 9(1) of Act 216).

Section 13(2) of Act 216 further provides for the validation of regulations made under the Ordinance, whether before or after Parliament had sat, and these were deemed to have been made under the Act. Hence the Essential (Security Cases) (Amendment) Regulations 1975 must be deemed to be valid. It is noted that the said Act 216 had been challenged, but the clear view emerging from the past decision of the Federal Court has been in favour of regarding Parliament as having the power to enact such legislation with retrospective effect, and on the wording of the Act, as not enacting in a manner amounting to an assumption of judicial power. In the subsequent case bearing the same title, *Teh Cheng Poh v PP* [1979] 2 MLJ 238, the Federal Court simply held, inter alia, at p 239 as follows:

> The regulations having been ruled to be ultra vires, it is open to Parliament to validate them and, further, to validate them with retrospective effect.

I am of the view that the said Act 216 did not encroach on the judicial power which by art 121 of the Constitution is vested in the courts. On this point, I would refer to the case of *Phang Chin Hock v PP* [1980] 1 MLJ 70, wherein the Federal Court adhered to the view that so long as the factual questions of guilt and innocence and sentence are still left for the courts to determine, there can be no ground to suppose a legislative transgression of judicial power. An Act is said to be valid even if it completely alters what was earlier perceived by the courts to be correct law.

For reasons above stated, I therefore hold the view that the Essential (Security Cases) (Amendment) Regulations 1975 (ESCAR) pursuant to which the trial of all the accused persons are being conducted are valid and enacted in accordance with the law. With this decision I hereby make an order that the trial of all the accused persons in this case shall be continued and proceeded forthwith.

Appeal dismissed.

Reported by Jafisah Jaafar